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Paper No. 7

CHARLES E GRAVES ASSOCIATES PC
6818 OASIS PASS
SUITE 100
AUSTIN TX 78732

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OFFICE OF PETITIONS

In re Application of
Ammicht, et al.
Application No. 09/872,810
Filed: June 4, 2001
Attorney Docket No. 5-3-15

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: ON PETITION
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This is a decision on the alternative petition to withdraw the holding of abandonment, petition to revive under 37 CFR 1.137(a), and petition to revive under 37 CFR 1.137(b), filed January 21, 2004.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

The petition under 37 CFR 1.181 is **DISMISSED**.

The petition under 37 CFR 1.137(b) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)" or "Renewed Petition under 37 CFR 1.137(b)". Extensions of time under 37 CFR 1.136(a) are permitted. No fee is required for a renewed petition.

The above-identified application became abandoned for failure to timely file a reply in response to the Notice to File Missing Parts of Nonprovisional Application mailed July 31, 2001. This Notice set a shortened statutory period for reply of two months for applicants to submit an oath or declaration, as well as

substitute drawings. No extensions of time under 37 CFR 1.136(a) were obtained. No reply having been received, the above identified application became abandoned by matter of law on October 1, 2001. Applicants filed a status inquiry on July 30, 2003. In response, a courtesy Notice of Abandonment was mailed on November 24, 2003.

Petition to Withdraw the Holding of Abandonment:

Petitioner asserts that he filed a reply that included an oath and declaration for each inventor. The PTO file is the official record of papers filed in this application. A review of the official file reveals that no oath or declaration was filed in response to the Notice to File Missing Parts, since no such oath or declaration is present in the file. An applicant alleging that a paper was filed in the PTO and later misplaced has the burden of proving the allegation by a preponderance of the evidence.

Petitioner has offered no proof of the timely submission of the oath or declaration. Petitioner has not submitted a USPTO date stamped postcard receipt itemizing an oath or declaration, or a transmittal letter with a timely certificate of mailing or facsimile transmittal under 37 CFR 1.8 or express mail under 37 CFR 1.10.

Moreover, even if petitioner **had** offered proof of the timely submission of the oath or declaration, petitioner has not accounted for the timely submission of the substitute drawings. In fact, petitioner admits that no substitute drawings were filed in response to the Notice to File Missing Parts, stating that he "erroneously concluded that the formal drawings in the instant case were already submitted." The Notice to File Missing Parts indicated that substitute drawings must be timely submitted to avoid abandonment.

In view of the above, the holding of abandonment can not be withdrawn.

As no fee is required for the filing of a petition to withdraw the holding of abandonment, no fee has been charged.

Petition to Revive Under 37 CFR 1.137(a) (Unavoidable Delay):

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(1); and (3) a showing to the satisfaction of the Commissioner that the **entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition** pursuant to this paragraph was unavoidable. The instant petition lacks items (3) and (1).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their

most important business."¹

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.²

Petitioner has not sought to show that the entire delay in filing the required reply (an oath or declaration **and** drawings) from the due date for the reply (September 30, 2001) until the filing of a grantable petition was unavoidable. Rather, petitioner argues that the delay in responding to the July 31, 2001 Notice to File Missing Parts was made unavoidable by the lack of response the PTO to applicants' status inquiry of July 30, 2003. This does not constitute unavoidable delay within the meaning of 37 CFR 1.137(a). Petitioner should have known that the failure to file substitute drawings in response to the Notice to File Missing Parts would have caused the application to become abandoned.

As 37 CFR 1.137(a) requires a fee for the filing, and not merely the grant of a petition, the petition fee of \$110 has been charged to petitioner's credit card, as authorized.

Petition to Revive Under 37 CFR 1.137(b). (Unintentional Delay):

A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(d). The instant petition lacks items (3) and (1).

With regards to item (3), petitioner has not submitted the required statement.

With regards to item (1), the file does not reveal the presence of an oath or declaration. On petition, petitioner has not submitted a copy of an oath or declaration. On request for reconsideration, an oath or declaration must be submitted.

As 37 CFR 1.137(b) requires a fee for the filing, and not merely the grant of a petition, the petition fee of \$1,330 has been charged to petitioner's credit card, as authorized.

No fee is required for a request for reconsideration filed pursuant to 37 CFR 1.137(a) or 37 CFR 1.137(b).

¹ In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (703) 872-9306
 Attn: Office of Petitions

Telephone inquiries related to this decision should be directed to the undersigned at (703) 305-0272.

Cliff Congo

Cliff Congo
Petitions Attorney
Office of Petitions